IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 19 OF 2000

1. State of Goa,
through the Dy. Collector
& S.D.O., Land Acquisition
Officer, Mapusa Sub-Division,
Mapusa,

2. Goa Agricultural Produce
Market Committee, Margao,
Goa through its Secretary,
Margao, Goa. ... Appellants.

Versus

Shri Shivram Anant Sinai Dessai,
r/o Mouswada, Pernem-Goa,
(since deceased) through L.Rs:

1. Smt. Sumiba Shivram Sinai
Dessai,
2a. Shri Anant Shivram Sinai
Dessai,
b. Shri Vinayak Shivram Dessai,
3a. Mrs. Medha Anant Sinai
Dessai,
b. Mrs. Veena Vinayak Sinai
Dessai,
4a. Mrs. Sunanda Satish
Herekar,
b. Mrs. Neelima Vishnu Mahatme,
c. Mrs. Supriya Prakash Pawar,
d. Mrs. Mzudula Mahesh
Deshpande,
5a. Mr. Satish Anant Herekar,
b. Mr. Vishnu Suryaji Mahatme,
c. Mr Prakesh Pundalik Pawar,
d. Mr. Mahesh Bhalchandra
Deshprabhu, all r/o Mouswada,
Pernem, Goa. ... Respondents.

Mr. Guru Shirodkar, Addl. Government Advocate for the appellants.

Mr. S. G. Dessai, Senior Advocate with Mr. Shivan Dessai and Mr. Laxman Pednekar, advocates for the respondents.

CORAM : **S. S. PARKAR, J.**

DATE : **8th/15th/20th July, 2005.**

ORAL JUDGMENT

This First Appeal arises from the land acquisition reference decided by the Additional District Judge in LAC No.117/97, in which the rate of compensation payable to the respondents was enhanced from Rs.55/- to Rs.230/- per sq. mt. by the impugned judgment and order dated 24th September, 1999.

2. The present appeal filed by the State and the acquiring body arises in the following circumstances:

The Government had acquired the plot belonging to the pedecessor-in-title of the respondents bearing sub-division 6-A of survey no.99 of village Pernem for the purpose of establishment of Regulated Market Yard at Pernem. The Land Acquisition Officer awarded the market price at the rate of Rs.55/- per sq. mt. in respect of the land admeasuring Rs.2240/- sq. mts. towards the compensation payable to the claimant.

The owner was aggrieved by the said rate and, therefore, filed reference claiming compensation at the rate of Rs.3,500/- per sq. mt. Before the Reference Court, the claimant examined himself and his valuer Pramod Dessai, P.W.2, who is an Architect and Engineer. He produced before the trial Court three Sale Deeds, which are as follows:-

One Sale Deed is dated 25th August, 1992, whereby 12 1/2 sq. mts. of land was sold at a price of Rs.2,500/- per sq. mt. The second Sale Deed is dated 28th May, 1993, whereby 200 sq. mts. of land was sold at the rate of Rs.200/- per sq. mt. and the third Sale Deed is dated 6th April, 1994, where a piece of land admeasuring 355 sq. mts. was sold at the rate of Rs.300/- per sq. mt. Out of the aforesaid Sale Deeds it appears that the claimant himself was the vendor in respect of the Sale Deed dated 6th April, 1994, though he has not expressly said so in his deposition before the Reference Court. Besides, he has also relied on a letter dated 15th June, 1994, addressed to his lawyer by the Junior Town Planner from Taluka level office, Pernem, in which it is stated that survey no.499/6A, i.e. the land in acquisition, falls partly in settlement and partly in commercial zone as per the zoning plan of Pernem town. It is further stated in that letter that there will be no objection from the planning point of view to carry out the development in conformity with the respective zone with prior permission from their office.

3. The claimant has also relied on the award in

respect of the land acquired by the Government for ITI, which is about 2 kms. from the acquired land, which is produced at Exh. 12. That land was acquired in the year 1989. He also relied on another Award at Exh.13 in respect of the land which is about 1/2 km. away from the acquired land, which was acquired for school complex. As per the evidence of P.W.2, Pramod Dessai, the Architect and Engineer examined by the claimant, the acquired property is situated in village Pernem, in the heart of commercial locality, which is highly barad land suitable for any construction purposes. He has further deposed that the School, Government Offices, Hospitals, Municipality, Market, Fire Brigade, Police Station, Post Office, Church, and Temples are located with an area of 400 to 500 mts. from the acquired land. The said witness has also produced the plan prepared by him showing all the amenities from the acquired land. Both the witnesses examined on behalf of the claimant were cross-examined by the advocate on behalf of the appellants.

4. The trial Court did not consider the three Sale Deeds produced by the claimant on the ground that they were not proved by either the vendor or the predecessor and, therefore, they should not be read in evidence. He, therefore, marked those three Sale Deeds as X, X1 and X2 for identification. Since no further evidence was led with regard to those Sale Deeds by examining the parties to the same documents, they remained on record under markings X, X1 and X2 and,

therefore, they were not at all considered by the trial Court for the purpose of arriving at the market value of the land under acquisition in view of the judgment of the Supreme Court in the case of ***T. Rama Reddy & Ors. vs. Land Acquisition Officer, Hyderabad*** , 9 [1995] 2 SCC 305).

5. The trial Court then considered the three Awards that were passed on the references in LAC No.74/92, LAC No.75/92 and another LAC No.114/92, produced on record as Exh.12 and 13, respectively. In Exh.12, the Award in LAC No.74/92 and 75/92 is dated 20th February, 1996 and the Award in Exh.13 was given in LAC No.114/92 on 1st February, 1996. In both the cases the Reference Court relied on the earlier Awards given in 1985 in respect of acquisition of 1983. While in Award Exh.12, i.e in LAC Nos. 74 and 75/92, the amount was fixed @ Rs.123/- per sq. mt. for the acquisition in the year 1989 in Award Exh.13, the compensation is granted @ Rs.141/- per sq. mt. in L.A.C. No.114/92, in respect of acquisition made in the year 1986. Though the aforesaid two Awards were produced before the trial Court, the trial Court has considered the Award produced at Exh.12 wherein the compensation was granted at the rate of Rs.123/- per sq. mt. for the acquisition of the year 1989 probably due to the proximity in the period and fixed the price in this case at the rate of Rs.230/- per sq. mt., which is under challenge in this Appeal filed by the State and

the acquiring body.

6. The learned Government counsel challenged the decision of the Reference Court on various grounds. Firstly, it is contended that the Reference Court ought not to have given increase of 20% on the ground of location and further a sum of Rs.8/- on the ground that the land under acquisition was in commercial and settlement zone, after giving escalation of 10% for the period between 1989 and 1994. Secondly, it is contended that the Reference Court erred in not making deduction towards the development charges since, according to him, the earlier reference relied on the Award Exh.12, does not seem to have deducted development charges. In support of his contention, he has relied on the decisions of the Supreme Court in the cases of ***Kasturi & Ors. vs. State of Haryana*** , [(2003) 1 SCC 354], ***Smt. Lila Ghosh (dead) through LR vs. State of West Bengal,*** (AIR 2004 SC 288) and in the case of ***V. Hanumantha Reddy (Dead) by LRs. vs. land Acquisition Officer & Mandal R. Officer*** , (2004 AIR SCW 75).

7. In the case of ***Kasturi & Ors.*** (supra), the Supreme Court has held that normally deduction should be made towards development charges at the rate of 1/3rd amount of compensation unless the land under acquisition is fully developed and nothing more is required to be done for development, which must be based on evidence. That was a case where the land acquired was about 84.23 acres which

was undeveloped though it had potential value for residential and commercial purposes. It is pointed out that in order to develop a large area of land roads are to be laid, provision for drainage is to be made and certain area has to be earmarked for civic amenities as against a small plot of developed land whose price was taken as a basis for arriving at the market value of the acquired land, which was about 4 acres in area. It was pointed out that the deduction towards development charges may vary depending upon potential value of the land which is yet to be developed and, in some cases, it may be more than 1/3rd and in other cases less than 1/3rd. Ultimately, the Supreme Court upheld the High Court order giving deduction of only 20% as against 1/3rd normal deduction. Considering the said decision in ***Kasturi's*** case as well as the other decisions of the Supreme Court the learned Government Advocate did not insist that this is a case where the deduction should be made to the extent of 1/3rd towards development charges, but it may be given to the extent of 20%. Then reliance was placed on the case of ***V. Hanumantha Reddy***, (supra), where the Supreme Court held that even if the land is having high potential or is proximate to the developed land, that itself would be no ground for not giving deduction towards development charges. It was also stated in paragraph 7 that though the acquired land may be having high potential value, yet it by itself cannot be claimed to be a developed land because

lot of developmental activities were required to be undertaken like laying of roads, sewerage facility, water supply, etc. so that the land would be made fit for construction of houses. That was a case where a chunk of land admeasuring 5 acres and 39 cents was acquired for providing house-sites to the poor in September, 1985, by Notification of 30th September, 1985, under Section 4 of the Land Acquisition Act.

8. As regards 20% increase given by the Reference Court on account of location of the land under acquisition, strong reliance was placed on the recent decision of the Supreme Court in the case of ***Smt. Lila Ghosh***, (supra). That was a case where the Reference Court had given escalation on the ground of location of the plot over and above the appreciation given at the rate of 10%. The High Court had not allowed that appreciation on the ground of location. It was upheld by the Supreme Court, observing that both the Reference Court as well as the High Court having given 10% towards potentiality, no question arises of giving an additional increase towards potentiality. In that case the Reference Court had given 10% appreciation to the price fixed in the earlier acquisition and added further 10% on account of the potentiality of the land. However, the High Court had not allowed 10% towards potentiality and 10% towards location, which was upheld by the Supreme Court.

9. On the other hand, Mr. Dessai, appearing for the

respondents, tried to distinguish the aforesaid judgments and relied on some other judgments of the Supreme Court justifying the increase given by the Reference Court towards location and the potentiality of the land under acquisition. As regards deduction towards development charges are concerned, he firstly contended that as held in ***Kasturi's*** case (supra) by the Supreme Court, a deduction cannot be necessarily made at the rate of 1/3rd of the amount of the compensation, but it may vary from case-to-case depending on the circumstances and may be even less than 20%. Secondly, he contended that deduction is not necessary to be made in every case unless it is proved that the land whose price is compared or made the basis for the purpose of fixing the market value, is fully developed land, and the land under acquisition must be in a remote place where the amenities of water, roads and drainage are not in the vicinity and, therefore, much expenditure will have to be incurred for the purpose of development of the land. He emphasized the fact that the present land under acquisition is in the town itself and is acquired for the purpose of establishment of a market yard. He also pointed out that the area of the land under acquisition is 2,440 sq. mts., which is not as large as 84 acres of land which was under acquisition in ***Kasturi's*** case (supra), nor a very large piece of land which was under acquisition in the case of ***Lila Ghosh*** (supra). According to him, the development charges are required to be deducted

in respect of large plots of land which are situated in a place away from the town, unlike the land under acquisition in this case, in respect of which large amount is required to be spent for the purpose of development e.g. for making available the various facilities like roads, sewerage, water supply, etc. According to him, the land under acquisition having an area of 2,440 sq. mts. situated in the town itself cannot be said to be as undeveloped as the large plots of land having 84 acres where every amenity has to be made available by incurring expenditure of large amount. He submitted that since the land under acquisition as per the letter of the Town Planing Department itself, is in a commercial zone and the area of the land is such which is neither a very large area nor a very small plot either, it can be put to best use for a residential-cum-commercial complex and, therefore, would fetch more price than the normal appreciation of 10% given for every year.

10. It is also submitted that the deduction towards development charges has not been laid down as a criterion for determining compensation under Section 23 of the Land Acquisition Act so that it should be made applicable in every case. But the courts have been making such deductions if a specific plea is raised on behalf of the acquiring body that amount will have to be incurred for the development of the land under acquisition because of its distant situation from the town and for want of amenities, which plea was never

raised before the Reference Court, nor any evidence was led to make out a case for deduction. On behalf of the claimant, reliance was placed on the judgment of the Supreme Court in the case of ***Bhagwathula Samanna & Ors. vs. Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam*** , [(1991) 4 SCC 506]. In that case, it was held that while arriving at the market value of a land under Section 23 of the Act by comparing sale of other adjoining lands variable factors had to be taken into account and sale value of a small developed plot of land can form basis for determining the value of a large tract of acquired land if it is also fully developed, in which case deduction towards development charges cannot be made. Relying on the said judgment, it was argued on behalf of the claimant that it is not disputed that the land under acquisition falls in settlement and commercial zone, as per the zoning plan of Pernem town in support of which letter dated 15th June, 1994, written by the Junior Town Planner of Pernem Taluka was produced. The said letter also mentioned that there will be no objection from the planning point of view to carry out the secondary development in conformity with the respective zone with prior permission. The claimant has also relied on the evidence of the valuer examined on behalf of the claimant, an Architect and Engineer Pramod Dessai, as P.W.2. No doubt that Architect also produced certain instances giving the estimate of the market value of

the acquired land which cannot be considered as the same was issued after the date of Section 4 Notification. According to his evidence, the acquired land is suitable for construction purposes and the local schools, Government offices hospitals, municipality, market, fire brigade, police station, post office, Church and Temples, are all located within 400 to 500 mts. of the acquired land. He has also prepared a plan showing all those amenities available around the acquired land which has not been challenged on behalf of the appellants.

11. It was contended by Mr. Dessai that considering those amenities the Reference Court was justified not only in not making any deductions towards development charges, but also giving 20% towards 8% increase due to location and the amenities and potentialities of the land under acquisition. He placed strong reliance on the decision of the Division Bench of this Court in the case of ***Osman Khan s/o Abdul Majid Khan & Anr. vs. State of Maharashtra*** , (AIR 1994 Bom. 271). That was a case where acquisition was made in respect of land admeasuring 8809 sq. mts. for the purpose of development of railway road. In that case a contention was raised on behalf of the State that while fixing the market value of the acquired land on the basis of sale transaction of small property deduction should necessarily be given towards the development charges required for development of large tracts in order to compare it with the small plot whose sale price is taken

as basis. After quoting from the Supreme Court judgment, the Division Bench considered the circumstance that in that case the acquired land was located by the side of the State Highway and surrounded by the buildings meant for commercial, industrial, residential and official use. The bus stand was also situated to the North just across the railway line. The trend of development of the city was also all along that road and the neighbouring areas of the acquired land were already developed and the houses had been constructed and, therefore, it was held that the principle of deduction did not apply following the ratio of the decision of the Supreme Court in the case of ***Bhagwathula Samanna*** (supra).

12. Two more contentions have been raised on behalf of the claimant. It was argued that the appellants had not challenged the award specifically on the ground that deduction towards development charges was not given, but the said ground has been taken for the first time across the Bar at the time of final hearing of this appeal. Neither the said plea was raised before the Reference Court, nor specific ground was taken in the memo of appeal. Reliance was placed on behalf of the respondents on certain judgments of the Supreme Court. In this connection he referred to Order 41 Rules 2 and 3 of the C.P.C. Order 41 Rule 2 provides that except by leave of the Court, the appellants shall not urge or be heard in support of any

ground of objection not set forth in the memo of appeal. It is, therefore, contended that since specific ground has not been taken in the memo of appeal, or subsequently by leave of the Court by amending the memo of appeal, the appellants should not be allowed to argue the said point. In this connection he has also relied on some judgments of the Supreme Court. Firstly, reliance was placed on the judgment of the Supreme Court in the case of ***Karpagathachi & Ors. vs. Nagarathinathachi*** (AIR 1965 SC 1752), in which new pleading which required further investigation of facts was not allowed to be raised for the first time in appeal before the High Court and the Supreme Court.

13. Secondly, reliance was placed on the judgment of the Supreme Court in the case of ***Chevalier I.I. Iyyappan & Anr. vs. The Dharmodayam Co., Trichur*** , (AIR 1966 SC 1017). In that case the Supreme Court held that a party cannot change its case at the appellate stage. The party had not raised the plea of licence or its irrevocability in the trial Court, nor it was adjudicated upon and, therefore, it was held that that plea could not be raised for the first time in appeal in view of Order 41 Rule 2 of the C.P.C. The appellants had not even applied for amendment of the grounds of appeal.

14. Next reliance was placed on the judgment of the Supreme Court in the case of ***M .P. Shreevastava vs. Mrs. Veena,*** (AIR 1967 SC 1193), in which it was held that the questions which were

never raised in the courts below cannot be allowed to be raised for the first time in appeal before the Supreme Court.

15. This contention raised on behalf of the respondents is sought to be met on behalf of the appellants by placing reliance on the grounds of appeal, some of which are of general nature. So far as the potentiality is concerned it has been expressly pleaded in ground (e) that the finding by the learned Judge that the acquired land had building potential is based on no evidence and, therefore, is perverse. Then, in ground (f) it is stated that the respondent-claimant had not led any evidence to establish that the acquired land and the land in the Land Acquisition Cases No.74/92 and 114/92, had any comparison or common features. As regards the 20% increase given due to the situation or the location of the land under acquisition, it is stated in ground (h) that the learned Judge had erred in fixing 20% more price as compared to land in previous acquisition cases. In my view the grounds taken in the memo of appeal do raise points which were urged by the Additional Government Advocate firstly about the increase given on the ground of potentiality of the land and secondly about the escalation given due to the location of the land. It is true that the point argued regarding the development charges only has not been specifically raised, but the learned Additional Government Advocate relied on ground (k), wherein it is stated that the learned Judge had not applied

the settled principles of law laid down by the Apex Court and this Court in fixing the market value of the acquired land. In that respect, as pointed out earlier, he has relied on some judgments of the Supreme Court where it is laid down as a principle of law that deductions towards the development charges can be made upto 1/3rd from the price of land which is taken as a basis for arriving at the market value of the acquired land, ofcourse in case the land under acquisition is an undeveloped plot and the land whose sale price is considered as a basis is a developed land.

16. Then it was argued on behalf of the respondents, that no evidence has been led by the appellants to show that the lands in respect of which the prices were fixed in the previous land acquisition cases, were developed plots, though he admitted that the land under acquisition is not a developed plot. The learned Additional Government Advocate appearing for the appellants, however, contended that the burden is squarely on the claimants to prove that the land under acquisition was developed land.

17. As regards the price fixed by the trial Court on the basis of previous land acquisition cases are concerned, I am of the opinion that the Reference Court has not given adequate reasons for giving escalations on the grounds of location of the land under acquisition and also the potentiality, except by observing that the land in

question exists partly in the settlement zone and partly in the commercial zone and it is located in Pernem town itself with amenities within 200mts. It is not mentioned as to where did the Reference Court get that the amenities were available within 200mts.

18. Lastly, it was argued on behalf of the respondents that the Reference Court had wrongly not considered the three Sale Deeds marked as X, X1 and X2, on the ground that the respondents had not examined the vendor or purchaser, or any witness to the said Sale Deeds. In this respect, reliance was placed on Section 51-A of the Land Acquisition Act and Order 41 Rules 22 and 27 A of the C.P.C. Order 41 Rule 22 C.P.C. entitles the respondent to challenge the finding against him in the court below in respect of any issue which ought to have been decided in his favour even without filing cross-objections. Secondly, under Section 51-A of the Land Acquisition Act in any proceeding under this Act a certified copy of a document registered under the Registration Act may be accepted as evidence of the transaction recorded in such document. Placing reliance on the said provision, it was argued that the Reference Court ought to have considered those Sale Deeds though the vendor or the purchaser was not examined. That provisions is not free from controversy. Looking to the fact that the said provision was inserted by way of amendment prima facie it creates an impression that mere production of certified copy of a Sale Deed in the land acquisition

proceedings would be sufficient for the authorities to act thereon, but the Reference Court did not place reliance on those Sale Deeds in view of the decision of the Supreme Court in the case of ***P. Ram Reddy & Ors. vs. Land Acquisition Officer, Hyderabad & Ors.***, (supra), in which it has been expressly held that the production of certified copies of registered documents does not dispense with the need for examining witnesses to establish the genuineness and truth of their contents. This view was expressly overruled by a larger bench of Three Judges of the Supreme Court in the case of ***Land Acquisition Officer and Mandal Revenue Officer vs. V. Narasaiah***, (2001 [2] Supreme 187), but the judgment in ***Narasaiah's*** case was delivered by the Supreme Court without being aware of the view taken by another Three Judge Bench of the Supreme Court earlier in the case of ***Special Deputy Collector & Anr. etc. vs. Kurra Sambasiva Rao etc.***, (AIR 1997 SC 2625), which had taken the same view as in the case of ***P. Ram Reddy*** (supra), holding that Section 51-A of the Land Acquisition Act only dispenses with the production of the original Sale Deed and allows to produce the certified copy.

19. The controversy arising from the two conflicting views taken by two Three Judge Benches of the Supreme Court of concurrent jurisdiction has been resolved by the Five Judge Bench of the Supreme Court on reference being made in the case of ***Cement***

Corporation of India Ltd. vs. Purya & Ors., [(2004) 8 SCC 270], by which the view taken in ***Narasaiah's*** case (supra) has been upheld and the contrary view taken by another Three Judge Bench in the case of ***Special Deputy Collector vs. Kurra Sambasiva Rao*** (surpa), has been overruled. This judgment of the Apex Court was brought to my notice only today (20th July, 2005), when this judgment was being delivered and the different views taken by the two Three Judge Benches of the Supreme Court was being considered in the judgment.

20. The learned Additional Government Advocate had contended earlier when ***Narasaiah's*** judgment was cited that in ***Narasaiah's*** case (supra), the Sale Deeds were already taken on record as exhibits on the basis of which the High Court had considered them in view of Section 51-A of the Land Acquisition Act, which was upheld by the Supreme Court. But in the present case the Sale Deeds were not exhibited by the trial Court in view of the decision in ***P. Ram Reddy's*** case (supra), as the decision in ***Narasaiah's*** case was not brought to the notice of the Reference Court and, therefore, neither the appellants nor the respondents had occasion to lead evidence or cross-examine the witnesses about the genuineness of the said Sale Deeds. As against that, on behalf of the respondents, the judgment of the Division Bench of this Court in the case of ***Osman Khan s/o Abdul Majid Khan & Anr. vs. State of Maharashtra*** (supra), was relied on in which much

before the judgment of the Supreme Court in ***Narasaiah's*** case was delivered, reliance was placed on the two Sale Deeds, one of which was exhibited and the other was produced but not exhibited and the market price was fixed on the basis of those Sale Deeds.

21. In the present case, though three Sale Deeds had been produced, none of them was exhibited but marked as "X" for identification and since they were not proved by leading evidence of either the vendor or the purchaser, there was no question of challenging the genuineness thereof on behalf of the appellants. As it is, the Reference Court also did not consider those Sale Deeds observing that the appellant i.e. the claimant would not be entitled to take the benefit of any of the Sale Deeds and, therefore, they were not considered by him while fixing the market value of the acquired land. It is argued that in one of the Sale Deeds the claimant himself was the vendor, but that is also not stated by the claimant in his deposition. In any case, that question will not arise now in view of the judgment of the Supreme Court in the case of ***Cement Corporation of India Ltd.,*** (supra), but the fact remains that the Sale Deeds were wrongly not exhibited by the Reference Court and, therefore, the matter will have to be remanded to the Reference Court for exhibiting the Sale Deeds in accordance with law. When they are exhibited the appellants shall have right to cross-examine the claimant or lead any evidence to disprove the genuineness

of those Sale Deeds. Both the sides have submitted that if the matter is remanded to the Reference Court both sides should be given liberty and opportunity to lead further and additional evidence by keeping all questions and contentions open. In my view, it will be in fairness of things that the matter is remanded to the Reference Court for deciding it in accordance with law after giving opportunity to both sides to lead such evidence as the parties may desire.

22. In the result, this Appeal is allowed, the impugned Judgment and Order dated 24th September, 1999, delivered by the Additional District Judge Panaji, in Land Acquisition Case No.117/97, is quashed and set aside and the matter is remanded to the said Court for admitting the three Sale Deeds marked X, X1 and X2, in evidence and exhibiting them and fixing the market value of the land under acquisition in accordance with law after allowing both the parties to lead further and/or additional evidence in the matter. Since the acquisition is of the year 1994, the Reference Court is directed to dispose of the matter expeditiously.

S. S. PARKAR, J.

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